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Legislative Notice

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S. 1712 - Export Administration Act

Calendar No. 311

Reported from the Committee on Banking, Housing, and Urban Affairs on October 8, 1999, by a unanimous vote of 20-0, as an original bill. Additional views filed. S. Rept. 106-180.

NOTEWORTHY

- At press time, the Senate is scheduled to take up S. 1712, the Export Administration Act of 1999 at 11:30 a.m. today. An 11:00 a.m. meeting was to take place between Banking Committee Chairman Gramm, chief sponsor of the bill, and four committee chairmen (Senators Thompson, Warner, Shelby and Helms), joined by Senator Kyl, who oppose the bill because they believe it provides insufficient protection of important U.S. national security interests. It is likely the bill will be debated extensively.
- In an attempt to address these concerns, a managers' amendment has been the subject of negotiations over the last few weeks. It is expected that a managers' amendment will be introduced, but no language was available at press time. However, at press time there were indications that the managers' amendment, including a national security "carve-out" did not adequately address, to the satisfaction of the national security committee chairmen, the most important national security issues which they previously identified.
- S. 1712 reauthorizes and reforms the expired Export Administration Act of 1979 that authorized the President to control the export of dual-use items (items with both commercial and military uses) for national security, foreign policy, and short-supply purposes. The Act expired in 1994.
- The bill increases the transparency and certainty of the licensing process, reducing burdens on exporters. Further, the bill strengthens the foreign availability provisions of the 1979 Act and adds a new mass market exemption from national security controls.

BACKGROUND

The Export Administration Act (EAA) of 1979 expired on August 20, 1994. Since that time, the President has continued export controls by issuing Executive Order 12924 pursuant to his authority under the International Emergency Economic Powers Act (IEEPA).

However, IEEPA was not intended to allow the President to maintain export controls indefinitely in the absence of Congressional authorization. Without reauthorization, the current export control regime may be vulnerable to a judicial challenge. This Act corrects this legally unsatisfactory situation by reauthorizing national security and foreign policy export controls, but does not authorize the President to impose short-supply export controls.

The United States faces a different world since the last major revision of the EAA in 1979. The Committee states that S. 1712 has been updated to reflect the changes since the end of the Cold War and the emergence of new threats, as well as the expansion of the global economy and the spread of technology.

In preparing for the legislation, the Banking Committee and its Subcommittee on International Trade and Finance held seven hearings. The following issues were addressed: multilateral control regimes; the export control process; the "Cox Commission" report; and emerging technologies. Testimony was given by administration officials, members of Congress, and industry and private-sector representatives.

The Committee released two staff discussion drafts of the bill. An original committee print was released on September 20, 1999.

On Monday, February 28, 2000, the Senate Armed Services Committee held a hearing to receive testimony on the national security implications of export controls and to examine S. 1712. Department of Defense representatives highlighted a number of concerns regarding the timelines for review of an item to be exported, and their concerns that the bill does not assure an adequate role for the Department of Defense, among other concerns. During the hearing, a managers' amendment sponsored by Senator Enzi and Senator Johnson was discussed, but no details were offered.

HIGHLIGHTS

According to the report, S. 1712 recognizes and seeks to balance three important U.S. policy interests:

- The economic interest in promoting exports;
- The national security interest in controlling the export of dual-use goods, services, and technologies to: limit the military potential of countries that threaten the United States and our allies; impede the proliferation of weapons of mass destruction and the means for their delivery; and deter international terrorism; and
- The foreign policy interests in promoting international peace, stability, and respect for fundamental human rights through economic and diplomatic engagement and the selective application of economic sanctions, including foreign policy export controls.

However, a number of Senators have voiced concerns that the bill does not do enough to adequately protect U.S. foreign policy and national security. These members, many of whom chair committees that oversee defense and national security policies, include Senators Warner (Armed Services), Helms (Foreign Relations), Shelby (Intelligence), Thompson (Governmental Affairs), as well as Senator Kyl.

In a February 29, 2000, letter to Majority Leader Lott, these four chairmen, along with six other colleagues (Senators Kyl, Roberts, Inhofe, Smith, Mack and Hatch) voiced their continuing concerns regarding S. 1712. Their letter reads, in part:

"Most recently, the Banking Committee has drafted a proposed managers' amendment including language to provide for a limited procedure for 'carving out' certain technologies from certain other provisions of S. 1712.

We have concluded that the Banking Committee's proposed changes to S. 1712 are insufficient to allay our concerns that the legislation provides insufficient protection for United States national security interests. The proposed 'carve-out' language, for example, is insufficient on its own terms to protect important national security interests. Indeed, the Banking Committee's proposed 'carve-out' language does not represent a unified Administration position at all, but rather merely language desired by industry and some in the Department of Commerce. Moreover, the 'carve-out' idea was initially proposed by the national security committee chairmen as part of a much broader package of measures designed to fix S. 1712's significant problems — measures that have thus far been rejected. Some of the national security chairmen

also have jurisdictional questions about the sweeping scope of S. 1712, and concerns about the bill's failure to recognize Israel's adherence to the Missile Technology Control Regime.

All in all, S. 1712 – even with its proposed managers' amendment containing 'carve-out' language – fails to address the national security committee chairmen's concerns. In no respect is this more true than in this legislation's determination to give wholesale discretion to the Department of Commerce vis-a-vis the Defense Department and the Intelligence Community in controlling national security export controls."

BILL PROVISIONS

Title I – General Authority

Title I provides general authorization for the President to conduct U.S. export control policy and to delegate such responsibility to other agencies or appropriate officials.

This title also directs the Secretary of Commerce to establish and maintain a "Control List" specifying the items that require a license or other authorization prior to export.

The bill establishes several forms of licensing and other authorization, such that:

- Individual licenses may be required for specific exports;
- Multiple licenses may be required for multiple exports of an item, instead of an individual license for each;
- Notification to the Secretary of the intent to export an item may be required in lieu of a license;
- The Secretary may also grant a license exception — the authority to export an item on the Control List without license or notification.

The Committee intends to ensure that exporters will be able to provide replacement parts for their exports unless the Commerce Secretary determines there is a reason not to do so. Therefore, the title allows after-market service or replacement parts be provided on a one-for-one basis for a lawfully exported item, (i.e. no license or other authorization is required). Exceptions are included, however, to allow the Secretary to determine when a license or other authorization is necessary or when the after-market or replacement part of service would materially enhance the capabilities of an item that gave rise to its control in the first place.

The Committee also intends that export technologies incidental to an exported item be allowed, so long as they do not enhance any capability that led to the item's inclusion on the Control List. The Act therefore provides that a license for an export of an item includes the export of incidental technology, but only so long as that technology does not exceed the minimum needed to install, maintain, repair, inspect, operate or use the item.

Further, the Act requires the Commerce Secretary to consult regularly with representatives from the private sector, particularly regarding decisions on mass market or foreign availability status of items on the "Control List." The Act also authorizes the Secretary to set up Export Control Advisory Committees, to be comprised of experts from industry and government, to provide technical advice and assistance regarding export control policy.

Finally, the Secretary is allowed to create regulations to implement the Act's provisions regarding the Control List, export licenses, and other authorizations and requirements.

Title II – National Security Export Controls: Subtitle A

Title II authorizes the President to impose export controls for national security purposes. Subtitle A details the authorities and procedures necessary to implement national security export controls. The authority is vested in the President, exercised by the Commerce Secretary, in consultation with the Secretary of Defense, intelligence agencies, and others as appropriate. This grant of authority is identical to 1979 EAA; however, this bill emphasizes the role to be played by intelligence agencies.

S. 1712 expands the purpose of the 1979 bill (i.e., to restrict the export of items that would contribute to the military potential of countries that would prove detrimental to U.S. national security) in two ways, by authorizing export controls to: 1) stem the proliferation of weapons of mass destruction and the means to deliver them; and 2) deter acts of international terrorism.

Export controls are authorized based on the end use or end user of an item that could materially contribute to the proliferation of weapons of mass destruction or their delivery. This provision is intended to serve as a means to control items that may not be listed on Commerce's Control List, but should be controlled due to the intended recipient or anticipated use of the item.

The Commerce Secretary is required to establish and maintain a National Security Control List. The items are identified and placed on this list with the concurrence of the Defense Secretary and with the consultation of other agencies, as appropriate. The Secretary must consider risk factors, as specified in the Act, when establishing and maintaining this list.

To increase the transparency and predictability of the export control system, the Committee requires the President to establish a five-country tiering system. The President must assign each country to one of five tiers for each controlled item or group of items. Countries

representing the lowest risk of diversion or misuse of an item are assigned to Tier 1 while countries representing the highest risk will be assigned to Tier 5. The President is given flexibility in assigning items to the tiers.

Current regulatory practice is codified in this title by limiting the control of certain items for export. For example, controls may not be placed on an item solely because the item contains parts or components subject to controls if the parts or components: are essential to the functioning of the item; are customarily included in the sale of the item; and comprise 25 percent or less of the total value of the item, unless the export would make a significant contribution to the military or proliferation potential of a controlled country or end user detrimental to U.S. national security.

On the re-export of an item produced in a foreign country that contains controlled U.S. parts or components, no authority or permission may be required if the parts or components comprise 25 percent or less than the item's total value. For countries designated as supporters of international terrorism, the value threshold is 10 percent or less.

Finally, the Secretary of Commerce is directed to establish a process for interested persons outside the Government to petition for changes to the control list.

Subtitle B: Foreign Availability and Mass-Market Status

This section directs the Commerce Department to review and determine the foreign availability and mass-market status of an item on a continuing basis. This section also amends the FY 1998 Department of Defense Authorization Act to allow Congress a 60-day period to review presidential changes to the level of controlled computer speed and establishes criteria to be considered for such a determination.

The Committee believes there is little national security benefit derived from controlling U.S. items if substantially identical items can be acquired through another source and if such items are produced and available for sale in large volume to multiple purchasers. Therefore, the U.S. export control system must include effective foreign availability and mass-market mechanisms, whereby those items which have foreign availability or mass-market status would be de-controlled (i.e., no license would be required for their export). This Act recognizes the necessity of a mass-market exemption from export controls, since these items are virtually uncontrollable by the nature of their wide distribution channels, massive volumes, and general purposes.

The Act does provide for the President to set aside a foreign-availability determination if failing to control the item would be detrimental to U.S. national security and such foreign availability is likely to be eliminated through negotiations with other countries. This set-aside, however, expires if negotiations are never commenced, negotiations end without success or, in any event, 18 months after the determination if the President has been unable to eliminate foreign

availability through negotiations. Upon expiration of a presidential set-aside, no license or other authorization shall be required to export the item.

While the Committee concluded that there may be times when an item determined to have mass-market or foreign-availability status should be controlled because of a threat that item may pose to U.S. national security, these instances are expected to be relatively rare.

Finally, this subsection requires an Office of Technology Evaluation to be established in the Commerce Department to gather information and conduct assessments on whether items are available to controlled countries from a foreign source or on a mass-market basis.

Title III – Foreign Policy Export Controls

Title III authorizes the imposition of export controls for foreign policy purposes — to promote international peace, stability, and respect for fundamental human rights, and to deter and punish acts of international terrorism. Since most foreign policy controls are unilateral and because the Committee believes that multilateral controls are preferable, this title imposes certain disciplines on the imposition of foreign policy controls.

Criteria to guide the President in imposing export controls for foreign policy purposes is provided in the bill. To impose controls, the President is required to consult with Congress, other countries, and industry prior to imposing a foreign policy export control. Title III also imposes an additional requirement — that the President publish a notice in the Federal Register 45 days prior, and solicit public comment at least 30 days prior to imposition of a control. The President can defer compliance with this requirement on national security grounds, provided the requirements are satisfied within 60 days.

As for existing foreign policy export controls, the President is required to review all such controls by February 1, 2002, and to continue the review every two years (the renewal year). Any control not specifically renewed, by report to Congress, will expire on March 31 of the renewal year. (In other words, any export control imposed under Title III shall terminate on March 31 of each renewal year unless specifically renewed by the President.) This rule, however, does not apply to those export controls required by law, those targeted against any country designated as supporting international terrorism, or to any control that has been in effect for less than one year as of February 1 of a renewal year.

Finally, this title requires that the President terminate any foreign policy control that has failed to achieve its objective.

Title IV – Exemptions for Agricultural Commodities, Medicine, and Medical Supplies

This title restricts the use of foreign policy export controls on agricultural commodities, medicine, or medical supplies. In addition, the President is directed to terminate any export control on agricultural commodities, medicine, and medical supplies required by law upon the date of enactment of the Act, unless specifically reimposed by law. Nations subject to the Trading with the Enemy Act and items that are controlled for national security purposes are specifically exempted.

Title V – Procedures for Export Licenses and Interagency Dispute Resolution

To ensure that export license decisions are consistent with U.S. national security and foreign policy goals, the bill establishes a risk management framework. Criteria for the evaluation of export license applications include risk factors such as the characteristics of the item, the threat to national security from misuse, and the risk of diversion. Reviewing the end-user and end-use of a proposed export is an important part of the analysis.

The process for considering export license applications are as follows: The Commerce Department has nine days to review all applications for completeness and to verify that a license is required for the item. The application, all supporting documents, and Commerce's analysis of the proposed export must be referred to the Department of Defense and other appropriate departments and agencies within the nine-day time period. These agencies then have 25 days to consider the application and forward a recommendation to Commerce. If any agency does not respond within the 25 days, it is presumed to have no objection to the issuance of the license. (Note: The time limit was reduced to 25 days from the 30 days allowed under current policy to ensure more timely results for exporters.)

At the end of 25 days, Commerce will either issue the license, notify the applicant of the intent to deny the license, or notify the applicant that the application is being referred to the interagency dispute resolution process, which is set up to ensure a wide range of facts and opinions are brought to bear on each case. If the export license application is denied, the applicant has 20 days to respond to a proposed denial, allowing the applicant to address or correct the reasons for denial.

If the agencies do not agree on approval or denial of an export license application, the application will be referred to the initial level of review within the interagency dispute resolution process — an interagency committee, chaired by a designee of the Commerce Secretary. Any member of a department or agency that participated in the interagency committee can escalate the decision to the next highest level of review. Decisions are then to be made by majority vote, with allowance made for any member of the review committee to appeal the decision. The entire

interagency process is to be completed or referred to the President not later than 90 days after the date of initial referral for interagency review.

Title VI – International Arrangements, Foreign Boycotts, Sanctions, and Enforcement

With regard to international arrangements, the bill requires an annual report be sent to Congress evaluating the effectiveness of each multilateral export control regime and detailing efforts to strengthen the regime. With respect to foreign boycotts, the Act directs the President to issue regulations prohibiting the participation of U.S. persons in boycotts imposed by a foreign country against a country that is friendly to the United States.

The Committee report states that the success of export control efforts depends upon vigorous enforcement of the law. Enhanced enforcement was a central theme of the Cox Committee recommendations and is a key aspect of this Act. Therefore, this reauthorization includes several new initiatives to strengthen enforcement such that penalties for violations of this Act, criminal and civil, are significantly enhanced to serve as a deterrent to would-be violators, as well as strengthening the post-shipment verification (PSV) provisions.

The Act increases penalties for violations. Individuals will be subject to a criminal fine of up to 10 times the value of the exports or \$1 million, whichever is greater, and a prison term of up to 10 years, or both. Imprisonment may be increased to life for multiple violations or aggravated circumstances. Persons other than individuals (i.e., corporations) shall be fined up to 10 times the value of the export or \$10 million, whichever is greater. Further, the Commerce Secretary may deny, for up to 10 years, the export privileges of any person convicted of a violation of U.S. export control laws. The Commerce Secretary is also authorized to require forfeitures of property for violations of the Act.

Enforcement is strengthened further through new programs of the Office of Export Enforcement, which is authorized to conduct undercover investigations in furtherance of its responsibility to enforce the EAA. In addition, PSV will continue to be an important part of the enforcement effort, focusing on exports of greatest risk to national security such as exports of high performance computers. A sum of \$5 million is authorized to hire 10 new investigators for PSVs; only one investigator is currently posted overseas.

Further, this title directs the President to impose sanctions: on foreign entities that endanger U.S. national security by violating multilateral export control regimes; on persons who contribute to the proliferation of missiles and items on the Missile Technology Control Regime (MTCR) Annex; and on persons who contribute to the proliferation of chemical or biological weapons or to their development. The President is given authorization to waive these sanctions in limited circumstances.

Various authorities are outlined in this section to enforce the export control requirements in the bill. While most of these mirror those of the 1979 Act, there are several new provisions. One such addition provides that any end-user refusing a PSV will be denied future exports of any controlled item. However, the mandatory PSV of exports of high-performance computers exceeding a speed of 2000 million theoretical operations per second, contained in the FY 1998 Department of Defense Authorization Act, is repealed.

The bill establishes Temporary Denial Orders, which are used when there is reasonable cause to believe that a person is engaging in, or is about to engage in, activity which would constitute a violation of the Act.

Title VII – Export Control Authority and Regulations

This title authorizes the Secretary of Commerce and the Under Secretary of Commerce for Export Administration to carry out the provisions of this Act.

Further, the Act increases the penalties that can be imposed for disclosure of confidential information. Criminal penalties up to \$50,000 and one year imprisonment can be imposed on U.S. government officers or employees for knowingly disclosing confidential information in violation of this Act. The Secretary is authorized to impose civil penalties of not more than \$5,000 for persons who otherwise disclose information in violation of the Act.

Title VIII — Miscellaneous Provisions

Recognizing the importance of keeping Congress fully informed about the conduct of export control policy, this title requires the Secretary to report to Congress, prior to February 1 of each year, on the administration of this act. This title also directs the Secretary to notify Congressional committees of jurisdiction whenever a violation of the Act poses a direct and imminent threat to national security.

COST

Assuming historical spending patterns and allowing for cost increases to cover anticipated inflation, the Congressional Budget Office estimates that implementing the bill would cost \$280 million over the 2000-2004 period.

OTHER VIEWS

Senator Mack.

"First, the Department of Commerce remains the predominant agency in the export evaluation process. This concerns me because of this agency's inherent conflict of interest. We cannot reasonably expect an export promotion agency to fairly or competently evaluate matters of national security. . . . I appreciate the enhanced role for the Department of Defense in this bill. In my view this should be significantly strengthened before we consider this legislation on the floor.

My other major concern is about the foreign policy export control section of the bill. This section states that the administration must have specific objectives for implementing the controls, do rigorous cost/benefit analysis on each control, and remove the controls after two years if the 'objectives' have not been met. I believe this eliminates the ability of the Executive to implement conscience-based controls on the export of sensitive items to outlaw regimes. This portion of the bill also needs some work as this bill moves through the process."

POSSIBLE AMENDMENTS

There were no known amendments at press time.

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